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No. 71-1349

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In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT HOWARD BROWN A/K/A HOWARD BROWN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1972 (Pet. App. 6a). A petition

for a rehearing was denied on March 20, 1972 (Pet. App. 7a). The petition for a writ of certiorari was filed on April 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit for a search warrant was sufficient.

2. Whether, in a prosecution for assaulting federal agents seeking to arrest him, petitioner was denied a fair trial by reason of the prosecutor's reference, in his opening and closing arguments, to heroin found in petitioner's home.

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was found guilty on a one-count indictment charging forcible assault upon Bureau of Narcotics agents engaged in the performance of their official duties, in violation of 18 U.S.C. 111 (Tr. 394-395).[1] On April 29, 1971, he was sentenced to imprisonment for ten years and a $2,500 fine. The court of appeals affirmed *per curiam* (Pet. App. 1a-5a).

The evidence showed that on the evening of February 11, 1971, federal narcotics agents learned that petitioner was to receive that evening a quantity of narcotics which his wife was to deliver to a specified

[1] "Tr." refers to the two-volume transcript of the trial testimony, which we have filed with the Clerk of this Court.

location (Tr. 27, 74, 194). The agents kept petitioner's residence under surveillance and arrested his wife as she was proceeding from there to the delivery site. From the back seat of her automobile the agents recovered two jars containing a white powder, which they believed to be heroin (Tr. 27-28, 74, 194, 195). Five days later tests disclosed that the substance in the jars was not heroin, but lactose, a cutting agent for heroin (Tr. 216-219).

After the arrest of petitioner's wife, several federal agents went with John Salopek, the Chief of Police of White Oak Borough, Pennsylvania, to petitioner's residence to arrest him (Tr. 29-30). Salopek knocked on the door, identified himself, and asked petitioner to come down from upstairs so that he could talk to him (Tr. 142-144). When petitioner opened the inner door, Salopek showed his official police credentials. After petitioner opened the storm door and Salopek entered, he again showed petitioner his credentials and stated, "Here is my I.D., in case you are in doubt or anything" (Tr. 146, 151-152). While doing this, Salopek stated that there were federal narcotics agents outside who would like to see petitioner. In response petitioner grabbed a rifle, pointed it at Salopek, and ordered him to get out (Tr. 146, 153).

During a struggle between Salopek and petitioner for the rifle, agents Ashton, Guseman and Lund came up on the porch and identified themselves by yelling "Police, drop the gun," "Federal Agents, drop the

gun" (Tr. 39-40, 82-83, 206). Finally Salopek lost his grip on the rifle and petitioner shot agent Lund in the leg (Tr. 42, 157, 161-162, 208-210). Petitioner then retreated into the house where he remained for about thirty-five minutes after which he threw out the rifle used in the shooting and surrendered to the agents who had surrounded his house (Tr. 49-50). Agent Ashton testified that, during the period when petitioner was alone in the house just prior to his surrender, Ashton heard water running inside the house for approximately fifteen minutes (Tr. 50-51). Ashton also testified that a familiar method of destroying heroin was to flush it down a toilet or run it down a water drain (Tr. 51).

On the morning following the night of the shooting, February 12, 1971, the agents obtained a search warrant for petitioner's residence at 206 Cool Springs Road (Pet. App. 51a-53a). In the execution of this warrant the agents recovered a drainpipe from a laundry sink (Gov. Ex. 9) and a glass jar from an upstairs closet (Gov. Ex. 10). The court denied petitioner's motion to suppress these exhibits, both of which were shown to have contained heroin, on the ground that they were relevant as to petitioner's motive and intent and part of the *res gestae* (Tr. 271-278). The court also permitted the prosecutor to refer in both his opening and closing arguments (Pet. App. 21a, 27a, 34a, 40a, 45a, 46a) to the fact that heroin had been found in petitioner's residence.

Petitioner did not testify in his own behalf. Defense evidence showed that on February 12, 1971, at

12:33 a.m., someone named Brown made a telephone call from petitioner's residence to the local police (Tr. 305-312). An agreed stipulation stated that at 12:31 a.m. on that date the McKeesport Police Department received a telephone call for an ambulance to assist a federal agent who had been shot, and that some time later the police received a call from a Mr. Brown at 206 Cool Springs Road, who stated that he had been robbed (Gov. Ex. 12; Tr. 344-345).

ARGUMENT

1. Petitioner contends that since the affidavit for the search warrant included the assertion that the material found in the two jars in Mrs. Brown's car was heroin, the affidavit was rendered completely invalid and did not authorize the introduction in evidence of heroin seized at petitioner's residence (Pet. 7-9). This argument is predicated upon the erroneous premise that the affidavit stated that the two jars contained heroin; instead, the affidavit stated that they contained "white powder believed to be heroin" (Pet. App. 53a). There is no dispute in the evidence that, at the time when Mrs. Brown's car was stopped, the agents believed in good faith that the jars contained heroin (Tr. 28, 74, 195). Thus no inaccuracy in the affidavit existed.

Moreover, even if it be assumed *arguendo* that the above allegation in the affidavit was factually inaccurate, it was of "only peripheral relevancy to the showing of probable cause and * * * did not go to

the integrity of the affidavit." *Rugendorf* v. *United States*, 376 U.S. 528, 532.[2] Apart from this allegation, other statements in the affidavit were clearly sufficient to constitute probable cause for issuance of the search warrant. These included the informant's statement that petitioner had told him he had $40,000 of heroin in his possession; the information that heroin would be delivered by petitioner's wife to a certain restaurant; the confirmation of petitioner's name, address and telephone number as given by the informant; the observation of petitioner's wife proceeding toward the restaurant before she was stopped by the agents; and the statement of the informant that if petitioner did not receive a call within ten minutes after his wife made a delivery, his normal procedure was to destroy all narcotics and leave the area (Pet. App. 52a-54a). From the affidavit as a whole there was a more than ample basis for the Commissioner who issued the search warrant to conclude that heroin was concealed in petitioner's residence. See *Jones* v. *United States*, 362 U.S. 257; *United States* v. *Ventresca*, 380 U.S. 102; *United States* v. *Harris*, 403 U.S. 573.

2. There is no substance to petitioner's contention that he was denied a fair trial by reason of the prosecutor's references, in his opening and closing argu-

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[2] The factual situation in the instant case is totally unlike that in *United States* v. *Upshaw*, 448 F. 2d 1218, 1222 (C.A. 5), where there were numerous misstatements of fact which "struck at the heart of the affidavit's showing of probable cause."

ments, to petitioner's possession of heroin found in his home after execution of the search warrant (Pet. 10-11). Evidence as to petitioner's possession of heroin, even though relating to a crime other than the one for which he was being prosecuted, was admissible to show the underlying circumstances explaining the agents' presence for the purpose of arresting petitioner in the performance of their duties, *United States* v. *Ferrone*, 483 F. 2d 381, 385-386 (C.A. 3), and to show petitioner's motive in shooting the agent in order to gain time to dispose of the heroin in his house by flushing a water drain. See *Spencer* v. *Texas*, 385 U.S. 554, 560-561; *United States* v. *Puff*, 211 F.2d 171, 174-175 (C.A. 2), certiorari denied, 347 U.S. 963. Petitioner's possession of heroin was also admissible to rebut his defense that he had acted reasonably in shooting the agent because he believed he was being robbed. Cf. *United States* v. *Antrobus*, 191 F. 2d 969, 971 (C.A. 3), certiorari denied, 343 U.S. 902.

The prosecutor's reference to petitioner as "a heroin trafficker," to which no specific objection was made at the time (Pet. App. 35a), though perhaps too strong, was not entirely inappropriate in view of the informant's statement to agent Ashton that petitioner had $40,000 in heroin in his possession (Pet. App. 53a); the circumstances of the arrest of his wife; the circumstances of petitioner's arrest; and the subsequent finding of heroin in his house.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Opinion Below

The *per curiam* opinion of the United States Court of Appeals for the Third Circuit has not been reported at 456 F2d 569.

Argument

The Brief for the United States in Opposition to the Petition for Writ of Certiorari concedes (Brief in Opposition, p. 7) that the prosecutor's reference to petitioner as "a heroin trafficker" was, perhaps, too strong. Such is

considered not entirely inappropriate in view of several cited factors, purportedly gleaned from the record.

The most crucial factor relied upon by the government—that the informant's statement to Agent Ashton that petitioner had $50,000.00 in heroin in his possession (App. K, p. 53a)—was not before the jury but was testimony offered only in the suppression hearing. This erroneous assertion raises what is tantamount to a new argument: that the prosecutor in his closing may refer to matters testified to outside the presence of the jury. (This blending of the evidence before the jury and the evidence not before the jury was done also by the Court of Appeals in footnote 3 to its opinion, 456 F2d 569, 571.)

The complaint as to the action of the prosecutor is that the clearly prejudicial remarks were not supported by fact or inferences from fact which were before the jury but were based upon hearsay allegations in the Affidavit to the Search Warrant.

We respectfully submit that the combination of all of the other factors recited in the brief in opposition ("the circumstances of the arrest of the wife; the circumstances of petitioner's arrest; and the subsequent finding of heroin in his house") would not make the remarks of the prosecutor appropriate or permissible.

Respectfully submitted,

.....,

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